No. 21,523

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 357, AFL-CIO,
Intervenor.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR INTERVENOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION, LOCAL 357, AFL-CIO

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JURISDICTION

These proceedings are pursuant to a petition for enforcement of an order of the National Labor Rela-

tions Board under Section 10(e) of the National Labor Relations Act, as amended. (29 U.S.C. §§141, et seq.) The unfair labor practices having occurred in Nevada, this Court, accordingly, has jurisdiction.

STATEMENT OF THE CASE

Since approximately December 1952, Reynolds Electrical and Engineering Co., Inc. (hereinafter referred to as REECO) has been the prime contractor for Atomic Energy Commission nuclear testing work on the Nevada Test Site. Prior to October 30, 1958, nuclear testing involved atmospheric tests. After that date a moratorium on all nuclear testing remained in effect until September 6, 1961. (R. Vol. V, p. 441; Vol. VI, p. 570.) From the latter date to the present time, all testing at the Nevada Test Site has been underground, occasionally in tunnels but more commonly in well holes.

Because of the change in the method of testing, REECO developed various forward staging and supply areas, called compounds or forward area compounds, proximate to the points where the tests occurred. The compounds are subdivided into segments called craft compounds, where specialized material and supplies for the particular craft are stored for brief periods.

In the compounds, the various construction trades employees have shops and supporting facilities where they fabricate structures and equipment, which they

later load on trucks and transport to the point of use or installation in the same administrative area. (R. Vol. V, pp. 408, 409, 414; Vol. VII, p. 869.) The installation points or well holes are relatively close to the compound, varying from 1200 feet up to two miles. (R. Vol. IV, p. 357.) Materials needed at the various compounds are usually transported thereto from five warehouses, some of which have warehouse yards as well as storage buildings, located on the test site. The warehouses are staffed and operated by employees represented by the Respondent (R. Vol. VII, pp. 901-908; Vol. IX, pp. 935-936), and all hauling from the warehouses to the compounds of the various crafts is by drivers represented by the Respondent, under an Associated General Contractor labor agreement with REECO.

Unloading of material delivered to the compound of each craft is not performed by employees represented by Respondent, but manually by the craft involved, sometimes with the assistance of laborers, or of operating engineers if use of a forklift is required. (R. Vol. IV, pp. 360-363; Vol. VII, p. 865.) The same procedure applies to loading of fabricated materials at each craft compound for transportation to the point of installation. (R. Vol. V, p. 420; Vol. VII, p. 865.) No Teamsters warehouse personnel are or ever have been employed in any of the forward area compounds or staging areas. (R. Vol. V, p. 446; Vol. VII, p. 874.) It is clear from the whole record in the Section 10(k) work assignment dispute before the NLRB, and the Board so found, that throughout the history

of the Nevada Test Site electricians have operated the work vehicles hauling electrical supplies, equipment and fabricated materials from their own compounds to the point of use or installation in the same administrative area.

In November, 1963, Respondent began a campaign aimed first at inducing and later at coercing REECO to reassign certain work from employee electricians, who are members of or represented by Intervenor herein, to other employees, who are members of or represented by the Respondent. More particularly, an object of Respondent's above-described conduct was to force or require REECO to establish composite Respondent-Intervenor crews at all electrical compounds and to assign the work of driving vehicles and transporting electrical supplies and equipment from electrical compounds to various points of use or installation to employees represented by Respondent rather than to employees represented by Intervenor. In support of this purpose, Respondent picketed REECO from May 12 until May 28, 1964 when the picketing was enjoined by the U. S. District Court for the District of Nevada pursuant to a petition filed by the Regional Director of the Twentieth Region of the National Labor Relations Board under Section 10(l) of the National Labor Relations Act, as amended. (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(l); herein called the Act.)

An initial unfair labor practice charge was filed against Respondent by REECO on May 5, 1964, and an amended charge followed on May 11, 1964, alleging

violations of Section 8(b)(4)(i)(ii)(D) of the Act. (R. Vol. I, pp. 3-5.) Upon said charges and pursuant to Section 10(k) of the Act, a hearing was conducted by a duly designated Hearing Officer of the Board on various dates between June 4, and June 25, 1964. The 10(k) Notice of Hearing described the disputed work as follows:

> The unloading of materials and equipment from vehicles at construction staging areas or area compounds within the AEC's Mercury, Nevada Test Site, the checking, tallying and placement or spotting of the materials and equipment within the construction staging areas or area compounds, the subsequent loading of materials and equipment on to vehicles at the construction staging areas or area compounds and driving such vehicles and unloading same at the point of utilization or installation of such materials or equipment.

On December 16, 1964, the National Labor Relations Board issued its Decision and Determination of Dispute (150 NLRB No. 44; R. Vol. I, p. 73), assigning the disputed work to electricians and holding that: (1) teamsters are not entitled to composite staffing at the electrical compounds but that such work is properly the work of the electricians; (2) electricians, rather than teamsters, are entitled to perform the work of driving vehicles transporting electrical supplies from the electrical compounds to the point of use, and (3) Respondent is not and has not been lawfully entitled to force or require REECO to assign the disputed work to teamsters. (R. Vol. I, p. 83.)

Subsequent to the filing of the unfair labor practices charges by REECO, and prior to the hearing in the Section 10(k) matter, Respondent instituted a proceeding in the U. S. District Court for the District of Nevada to compel specific performance of an arbitration award purporting to award the disputed work to it rather than to employees represented by Intervenor. REECO and Intervenor filed answers to the Respondent's action and on March 5, 1965, the Court issued an order staying the proceedings pending final decision in the Board proceedings.

After Respondent advised the Regional Director of the Twentieth Region of the National Labor Relations Board that it would not accept or comply with the Board's 10(k) determination a complaint alleging violation of Section 8(b)(4)(i)(ii)(D) issued herein.

The record transcript of the 10(k) proceedings was stipulated into evidence at the hearing before a Trial Examiner of the National Labor Relations Board and nothing offered in the way of newly discovered evidence by Respondent was admitted into evidence at that hearing.

The Trial Examiner in his decision concluded, *inter alia,* that:

> By refusing to make deliveries of materials destined for forward compound areas manned by employees of REECO, who are represented by IBEW, and by other labor organizations; by engaging in a strike; by threatening to engage in a strike; by inducing and encouraging employees of REECO to engage in a strike or a concerted refusal in the course of their employment to per-

> form services, both by means of oral instructions and by the imposition of a picket line, with an object of forcing or requiring Reynolds Electrical and Engineering Co., Inc. to assign the work of driving vehicles transporting electrical supplies from forward electrical compounds to point of use, and for the further purpose of requiring composite staffing of forward electrical compounds by requiring REECO to employ employees represented by Respondent at the forward electrical compounds on a ratio of one to one with other craftsmen manning said electrical compounds, or to employ members of the Respondent at said electrical compounds to the exclusion of other employees who are represented by other craft unions, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(D) of the Act.
>
> (Tr. Ex's. Dec., pp. 21 & 22; R. Vol. I, pp. 37-38.)

Respondent thereupon appealed to the National Labor Relations Board through the filing by it of Exceptions to the Trial Examiner's Decision, raising the same arguments it now attempts to assert to this Court in its Answer to Petition for Enforcement. It should be noted that the contentions now asserted by Respondent to this Court were also raised by Respondent in the Section 10(k) proceeding and also in the proceeding before the Trial Examiner. Thus, at each stage of these proceedings, Respondent's contentions were rejected in accordance with well-established principles of law.

The National Labor Relations Board affirmed the decision of the Trial Examiner after consideration

of the entire record in this case and adopted the findings and conclusions of the Trial Examiner that Respondent engaged in unfair labor practices within the meaning of Section 8(b)(4)(D) of the Act. *(Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and Reynolds Electrical & Engineering Company, Inc.,* 157 NLRB No. 130.

Upon the failure of the Respondent to observe and comply with the decision and order of the National Labor Relations Board, this case was brought to this Court pursuant to the National Labor Relations Board's petition for enforcement of its orders.

QUESTIONS INVOLVED

1. Whether there is substantial evidence in the record as a whole to support the determination of the National Labor Relations Board that electricians rather than teamsters are entitled to performance of the work of unloading of materials and equipment from vehicles at construction staging areas or area compounds (referred to as composite staffing) within the Nevada Test Site and the subsequent loading of materials and equipment on to vehicles at the construction staging areas or area compounds and driving such vehicles and unloading same at points of utilization.

2. Whether Respondent's non-compliance with the National Labor Relations Board's work assignment

determination and its activities directed toward reassignment of the disputed work to Respondent's members constitute activities proscribed by Section 8(b)(4)(D) of the Act.

SUMMARY OF ARGUMENT

Under well established law the National Labor Relations Board correctly asserted jurisdiction over the subject matter of this case.

The findings and conclusions of the National Labor Relations Board that electricians employed by the Reynolds Electrical and Engineering Company (REECO), rather than teamsters represented by Respondent, are entitled to the work assignments of unloading of materials and equipment from vehicles at construction staging areas on area compounds (composite staffing) within the Nevada Test Site and the subsequent loading of materials and equipment on to vehicles at the construction staging areas or area compounds and driving such vehicles and unloading same at points of utilization and installation of said materials and equipment is supported by substantial evidence in the record herein. The 10(k) decision of the National Labor Relations Board is clearly neither arbitrary nor capricious and therefore must be upheld. *NLRB v. International Longshoremen's and Warehousemen's Union* (C.A. 9, 1967), 378 F.2d 33.

Consequently, the failure of Respondent to comply with the National Labor Relations Board's work dispute determination and Respondent's picketing and

other activities directed toward requiring the reassignment of said work to teamsters, constitutes conduct violative of Section 8(b)(4)(D) of the Act.

ARGUMENT

THE FINDINGS AND CONCLUSIONS OF THE TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD, ADOPTED AND AFFIRMED BY THE NATIONAL LABOR RELATIONS BOARD, ARE SUPPORTED BY EVIDENCE IN THIS RECORD OVERWHELMINGLY ESTABLISHING THAT ELECTRICIANS ARE ENTITLED TO THE WORK ASSIGNMENTS OF UNLOADING OF MATERIALS AND EQUIPMENT FROM VEHICLES AT CONSTRUCTION STAGING AREAS OR AREA COMPOUNDS WITHIN THE NEVADA TEST SITE (REFERRED TO AS COMPOSITE STAFFING) AND THE SUBSEQUENT LOADING OF MATERIALS AND EQUIPMENT ON TO VEHICLES AT THE CONSTRUCTION STAGING AREA OR AREA COMPOUNDS AND DRIVING SUCH VEHICLES AND UNLOADING SAME AT POINTS OF UTILIZATION. ACCORDINGLY, RESPONDENT'S ACTIVITIES DIRECTED TO THE END THAT SUCH WORK BE REASSIGNED TO ITS MEMBERS CONSTITUTES CONDUCT VIOLATIVE OF SECTION 8(b)(4)(D) OF THE ACT. THEREFORE, THE PETITION FOR ENFORCEMENT OF THE BOARD'S ORDER IN THIS CASE SHOULD BE GRANTED BY THIS COURT.

A. The Evidence Clearly Establishes That the National Labor Relations Board Properly Assigned the Disputed Work to Electricians Rather Than to Those Teamsters and the Failure of Respondent to Abide by the Board's Decision Warranted the Board's Determination That Respondent Committed Unfair Labor Practices Within the Meaning of Section 8(b)(4)(D) of the Act.

Section 8(b)(4)(D) provides that:

> (b) It shall be an unfair labor practice for a labor organization or its agents— . . .
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged

in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufac ture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

. . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

The complaint issued in this case by the National Labor Relations Board simply and directly alleges that:

VI

(a) Commencing on or about April 23, 1964, the Respondent Union, by its officers, agent and representatives, has engaged in, and has induced or encouraged individuals employed by REECO to engage in, refusals to transport and deliver goods, materials and supplies at REECO's N.T.S. location.

(b) Commencing on or about May 12, 1964, the Respondent Union, by its officers, agents, and representatives, engaged in threats to picket, and

in picketing of REECO's operations at the N.T.S. Respondent's picketing continued until approximately May 25, 1964, when it was enjoined by order of the United States District Court for the District of Nevada.

VII

(a) By the conduct described above in paragraph VI, Respondent Union, by its officers, agents and representatives, has engaged in and has induced and encouraged individuals employed by REECO to engage in, refusals in the course of their employment to use, transport, deliver or otherwise handle or work on goods, articles, materials or commodities or to perform services at REECO's N.T.S. location.

(b) By the conduct described above in paragraph VI, Respondent Union, by its officers, agents and representatives, has threatened, coerced, and restrained REECO.

VIII

(a) An object of Respondent Union's conduct described above in paragraphs VI and VII has been to force or require REECO to assign certain of the work performed at those portions of the N.T.S. location designated as the electrical compounds to employees represented by Respondent Union rather than to employees represented by the I.B.E.W.

(b) An object of Respondent Union's conduct described above in paragraphs VI and VII has been to force or require REECO to assign the work of driving vehicles transporting electrical supplies from the aforesaid electrical compounds

> to various points of use on the N.T.S. to employees represented by Respondent Union rather than to employees represented by the I.B.E.W.

These allegations were proved beyond any doubt. The conduct itself consisted of a campaign by the Respondent, beginning in the last few months of 1963 to force REECO, the prime support contractor at the Nevada Test Site, to take as much as possible of certain work away from the electricians and give it to employees represented by the Respondent. When REECO refused, the Respondent commenced overt proscribed activity, including threats, sit-downs, slowdowns, strikes, and picketing in an attempt to coerce REECO into reassigning the work from the crafts performing it to Respondent's members. (R. I, p. 86; Vol. XIV, pp. 2061, 2063-2066, 2078-2079, 2071; Vol. IV, pp. 270-271, 276-279, 281-288, 307; Vol. V, pp. 384, 393, 404-406; Vol. VI, pp. 589-592; Vol. VII, pp. 866-867.)

The National Labor Relations Board, in proceedings under Section 10(k) of the Act (150 NLRB No. 44), reviewed this conduct, which an examination of the Record will show to be overt and extensive, and in its 10(k) decision it succinctly summed up the conduct as follows:

> B. *Evidence of conduct violative of Section 8(b)(4)(D).* . . .
>
> On April 17 or 20, 1964, Carter accompanied an A.E.C. inspector on a tour of the test site. At that time Carter observed electrical compounds being used for the storage of supplies and elec-

> tricians performing loading work at the electrical compounds. Carter advised REECO that he considered the electrical compounds to be "exclusive electrical warehouses" within the meaning of the Carter-Leigon Agreement and that REECO was violating that agreement by not utilizing composite crews to perform "warehousemen's" duties at the electrical compounds. Discussions between Carter and REECO officials failed to produce any agreement with respect to the matter and on April 23 Carter told the job stewards and Teamster business representatives to inform Teamster drivers not to deliver supplies to electrical compounds unless there was a composite crew and/or a warehouse receiving clerk. From April 23 to 28 Teamster drivers refused to make deliveries to the electrical compounds. (150 NLRB No. 44; R. Vol. I, pp. 73, 76-77.)

Additionally, Respondent picketed the Nevada Test Site from about May 12, 1964 until approximately May 28, 1964 when it was enjoined from doing so by Order of the United States District Court for the District of Nevada, pursuant to the National Labor Relations Board's request for a 10(l) injunction in this case.

Respondent's own version of the events suffices to establish proscribed conduct. Thus, in its brief in the 10(k) proceedings Respondent summarized as follows:

> On April 21, 1964, while Carter and the AEC investigator were in Area #17 electrical compound, Carter observed eight Electricians loading

a single pick-up truck. (Carter, Tr. 2062.) He was informed that they had been at it all morning. In the meanwhile, two Teamster-driven flatrack delivery trucks were standing by, waiting to be unloaded. (Carter, Tr. 2062.) Carter spoke to Taylor, the superintendent in charge, and demanded that there be an equal number of Teamsters to Electricians assigned to load and unload the trucks, in accordance with the Carter-Leigon agreement. (Carter, Tr. 2063-2065.) Taylor said the area was just starting up and that although it might become a warehouse later, it was still an electrical compound where Electricians were to do the loading and unloading. (Carter, Tr. 2065.) Carter took the position that if it was not a warehouse, all the work belonged to the Teamsters because, under the Carter-Leigon agreement, Electricians had only been given composite staffing rights in warehouses. (Carter, Tr. 2065-66.) Carter then ordered the two Teamster trucks to return their loads to the Area #12 warehouse and stay there until REECO put a composite crew of Teamsters and Electricians in the electrical compound to do the unloading. (Carter, Tr. 2066, 2068-2071.)

The following day, Carter met with Lemon and Crockett, the REECO Project Manager, at the office of AEC. At this meeting, Carter informed REECO that the Teamsters were insisting that REECO comply with the Carter-Leigon agreement and the 1957 work assignment award and that until REECO complied, the Teamsters were going to refuse to deliver any materials to the electrical compounds. (Carter, Tr. 2073-2077.) REECO placed neither Crockett, Lemon nor

> Groeniger on the stand to dispute this testimony. Carter thereafter issued instructions to his business agents and stewards to stop only material going to electrical compounds "where the electricians were loading, unloading, and hauling it." (Carter, Tr. 2078-2079.) However, he learned later that in some cases the business agents and stewards had violated his instructions and had failed to make deliveries to other crafts where there were mixed loads and the first delivery was routed to an electrical compound. (Carter, Tr. 2079-2080.) Teamster business agents, however, have "no authority to establish policy" for the union. (Teamster's Brief, pp. 25-26.)

Thus, Respondent does not deny the conduct but rather argues that its object was not proscribed by Section 8(b)(4)(D). However, its 10(k) brief also admits that Respondent's conduct during the April 17-21 period was not concerned with its demand for a receiving clerk but was directed toward Respondent's work acquisition object of composite crews in electrical warehouses.

> It seems self-evident from the above review that the proscribed acts complained of, which occurred from April 22 to April 28, 1964 were intended to implement the Teamster demand for adherence by REECO with the Carter-Leigon agreement and the 1957 work task award as applied to composite crews in electrical compounds (construed by the Teamsters to be field warehouses or yards), and as applied to hauling of electrical materials from those compounds to points of use, other than on work trucks on the first load of the shift. The proscribed action was

not taken to implement the Teamster demand for a receiving clerk in the mixed compounds, nor for a Teamster forklift operator in such compounds, the latter demand having been theretofore abandoned by the union. . . . (Teamster's Brief, pp. 26-27.)

Again, however, there is no refuting the National Labor Relations Board's well reasoned rejection of this fallacious contention as to "object." Thus, the Board in its 10(k) decision clearly pointed out the speciousness of the Teamster's contention:

Applicability of the Statute

While the Teamsters do not deny that they caused a work stoppage to support their claim to composite staffing at the electrical compounds, they contend, in effect, that there is no jurisdictional dispute under the Act as they do not seek the reassignment of work now being performed by electricians but merely that Teamsters be employed on an equal ratio with electricians.

It is obvious, however, that the Teamsters could not have assumed that REECO would maintain twice the necessary work force at the compounds. Thus, the Teamsters in making their demand for composite staffing must have contemplated a reduction in the existing staff of electricians to permit an equalization of the number of Teamsters and electricians. We concluded, therefore, that as a practical matter the Teamsters' claim for composite staffing at the electrical compounds constituted a demand for the reassignment of work being performed by electricians to Teamsters, and that a dispute within the meaning

of 8(b)(4)(D) exists and the issue is properly before the Board for determination under Section 10(k).

As to the Teamsters' claim to the work of driving delivery vehicles from the compounds to the point of use, it is undisputed that the Teamsters engaged in picketing from May 12 to May 28, when picketing was halted by court order, to enforce their demand that the Employer reassign the driving of such vehicles from the electrical compounds to the point of use of the supplies. We conclude, therefore, that a dispute within the meaning of Section 8(b)(4)(D) exists with respect to this issue and that it is properly before the Board for determination under Section 10(k). (150 NLRB No. 44; R. Vol. I, pp. 73, 77-78.)

B. Respondent's Contentions That the National Labor Relations Board Was Without Jurisdiction to Entertain the Work Assignment Disputes and to Find That Respondent Engaged in Conduct Violative of the Act, or, in the Alternative That the National Labor Relations Board Should Have Deferred Its Proceedings in Favor of Respondent's Suit in the U. S. District Court to Compel Specific Performance of an Arbitration Award Purporting to Grant the Disputed Work to Respondent's Members Is Contrary to Well-Established Law.

Respondent, in all stages of the proceedings before the National Labor Relations Board, contended, as it contends in this Court, that it engaged in the admitted inducement and encouragement of work stoppages and the admitted picketing and threats of picketing, not for an object proscribed by Section 8(b)(4)(D) of the Act but for the purpose of enforcing REECO's compliance with the Carter-Leigon Agreement and/or the arbitration award of the Associated

General Contractors (AGC) Joint Committee.[1] The AGC award, in which proceedings Intervenor was *not* a participant, purported to determine that when vehicles other than work trucks are used, REECO's practice of assigning electricians to transport materials from compounds to actual work sites violated REECO's collective bargaining agreements with Respondent and that such work is to be performed by Respondent's members.

The basic inequity involved in enforcing a bilateral arbitration award in a trilateral work dispute is clearly evidenced by the facts of the present case where both unions are claiming the work under their respective collective bargaining agreements with different employer associations of which REECO is a member. The possibility of enforcement of any bilateral award in such a context can only result, as it has in the present case, in a race to the Unions' respective arbitration procedures, redundant litigation and awards, dissatisfaction, picketing, and labor unrest.

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[1]It should be noted that although the Record, and this brief, refers to the AGC action as an award, the decision was merely a second-step grievance resolution rather than the decision of an independent impartial arbitrator. The AGC Joint Committee included representatives of REECO and Respondent but Intervenor herein was not represented in the Committee's proceedings. The Intervenor obtained a similar decision from N.E.C.A., awarding the disputed work to the Intervenor, but Respondent was not a participant in those proceedings. In these circumstances, neither award binds all three parties so neither can be considered a voluntary adjustment of the dispute, *Newspaper and Mail Deliverers Union of New York (News Syndicate Co.)*, 141 NLRB 578, 580, or as a defense in this proceeding, *Local 327 Teamsters (S&W Construction Co.)*, 142 NLRB 170, 173 and cases therein cited.

A unanimous California Supreme Court acting under Section 301 of the NLRA has directly held that there cannot be a valid arbitration award in the absence of a party directly affected by the award. *Retail Clerks Local 770 v. Thriftimart, Inc.,* 380 P. 2d 652, 655; 30 Cal. Rptr. 12, 15 (1963).

As the *Thriftimart* Court points out, the Supreme Court trilogy of Steelworkers arbitration cases (*United Steelworkers v. American Mfg. Co.,* 363 U.S. 564; *United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574; *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593) which compel confirmation of an arbitration award and prohibit judicial review of both the issue of arbitrability and the merits of the award are based on the premise that:

> Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . The judicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. 363 U.S. at pp. 582-583 [4 L. Ed. 2d 1417].

The obvious lack of due process inherent in a bilateral arbitration in a trilateral situation has long been recognized by the National Labor Relations Board. If there is an unfair labor practice involved, generated by acts of one of the claiming unions, the Board has held in *New York Times,* 137 NLRB No. 78, that a jurisdictional dispute between two unions

is properly before the Board for determination notwithstanding the circumstance that both unions have arbitration clauses in their contracts with the employer. The Board held that such clauses cannot constitute a voluntary method for adjustment as envisaged by Section 10(k) since arbitration under either union's contract would not bind the other union.

Similarly in *News Syndicate Co., Inc.,* 141 NLRB No. 50, the Board stated:

> These arbitrations do not constitute an adjustment of the dispute within the meaning of Section 10(k) for the very basic reason that the Mailers arbitration would be binding only upon the Mailers and the Company, and the Deliverers' arbitration likewise would be binding only upon the Deliverers and the Company. The voluntary adjustment must bind *both* disputing Unions as well as the Employer to come within the meaning of voluntary settlement as set out in Section 10(k).

Thus, in the case of *Winslow Bros. & Smith Co.,* 90 NLRB 1379 (1950), which involved a dispute between the Teamsters and the Fur Workers, the Board refused to give controlling effect to a prior arbitration award of a particular work function to the Teamsters, observing "we particularly note the absence of the Fur Workers from the arbitration proceedings." Id. at 1384. See also *NABET,* 105 NLRB 355 (1953); *News Syndicate Co., Inc.,* 141 NLRB 578; *I.B.E.W., Local* 4, 129 NLRB 958; *NLRB v. Local 825, I.U.O.E.,* 55 LRRM 2112 (C.A. 3, 1964).

In *NLRB v. Radio & Television Broadcast Engineers Union,* 364 U.S. 573, the United States Supreme Court interpreted Sections 8(b)(4)(D) and 10(k) of the National Labor Relations Act to require the Board to exercise its "responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision." 364 U.S. at page 586.

In the *Radio Engineers* case, *supra,* the Court carefully weighed the alternatives of arbitration versus NLRB resolution of jurisdictional disputes affecting interstate commerce where an unfair labor practice was involved, and the Court reasoned that the NLRB, not arbitration, was the Congressionally required forum.

> Section 10(k) came into the [Act] . . . as the result of an amendment offered by Senator Morse which, in its original form, proposed to supplement this blanket proscription by empowering and directing the Board either "to hear and determine the dispute . . . or to appoint an arbitrator to hear and determine such dispute. . . ." The authority to appoint an arbitrator passed the Senate but was eliminated in conference, leaving it to the Board alone "to hear and determine" the underlying jurisdictional dispute. The Board's position is that this change can be interpreted as an indication that Congress decided against providing for the compulsory determination of jurisdictional disputes. . . . But Congress, after discussion and consideration, decided to intrust this decision to the Board. 364 U.S. at page 586.

The First Circuit has refused to order a bilateral arbitration under Section 301 of the LMRA in a trilateral work dispute case *even where no unfair labor practice was present* on a theory that an NLRB representation case certification of a unit might be affected.

> It is true that no unfair labor practice may have been committed . . . IAM protests that it is not seeking to represent other employees; it merely wishes their work. We are not impressed by this distinction. Certification and representation are both bottomed on work categories. On the facts here alleged a decision by the arbitrator in IAM's favor, if erroneous, would invade IBEW's certification . . . A union by contract with an employer cannot define the scope of its certification; that is the Board's function . . . [J]urisdictional disputes between unions are precisely its province. It is appropriate that this jurisdiction be exclusive. *Local 1505, I.B.E.W. v. Local 1836, I.A.M.,* 304 F. 2d 365, 367 (C.A. 1, 1962).

Once an 8(b)(4)(D) unfair labor practice has been committed and the unique and specific machinery of Section 10(k) of the National Labor Relations Act has been invoked, it seems manifest that Congress did not intend to subvert and destroy the efficacy of Section 10(k) of the Act by permitting an alternative and contradictory method of settling the dispute under Section 301 of the same Act. Congress in Section 10(k) considered the alternative of voluntary adjustment of the work assignment and specifically commanded the Board to determine the work assign-

ment unless the parties agree within ten days to a method of voluntary adjustment.

The National Labor Relations Board, in proceedings under Section 10(k) of the Act, after consideration of all factors including the arbitration awards, has now determined that REECO should assign the work in question to electricians represented by the Intervenor. Thus, the relief which the Respondent requests the Court to grant would directly conflict with the outstanding ruling of the Board. That this Court is without power to grant such relief is settled by *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261.

While holding that a suit to compel arbitration would lie despite the existence of a Board remedy, the Supreme Court recognized in *Carey,* as it had in *Smith v. Evening News,* 371 U.S. at 197-198, that the existence of a concurrent jurisdiction in the Board and the Courts could lead to serious problems. That is, the arbitrator might resolve the dispute a certain way; meanwhile, if the Board's jurisdiction were invoked, it might reach a contrary conclusion. There was, however, absolutely no doubt in the Court's mind as to the proper resolution of such a clash. It stated (375 U.S. at 272):

> Should the Board disagree with the arbiter . . . the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301 . . .
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> • •
>
> The superior authority of the Board may be invoked at any time.

In *J. R. Condon & Sons, Inc.*, 148 NLRB 356 the Board stated, citing *Carey*, "further, under the circumstances here, the court's action enforcing the [arbitration] award does not bind the Board or require the Board to give any different effect to the award."

It is for the Board in the 10(k) proceedings to determine which union is entitled to the work in dispute.[2] The fact that one object of the union's strike activity was to force the employer to comply with the terms of their contract, does not take the activity out of 8(b)(4)(D)'s proscription where it appears that an object thereof is also to force the employer to assign particular work to the respondent union. *McLeod v. New York Paper Cutters Union, Local 119*, 53 LRRM 2380 (E.D. N.Y.).

In *Nichols Electric Co.*, 137 NLRB 1425 and 140 NLRB 458, enforced *NLRB v. Local 825, Operating Engineers*, 326 F. 2d 213, 55 LRRM 2112 (C.A. 3), a work assignment dispute was held properly before the Board for determination notwithstanding that the rival union relied upon an arbitration award in its favor, where, as here, the employer and the union representing employees to whom the work was assigned, insisted they were not bound by the award.

It is the fundamental concept of Section 8(b)(4)(D) that a union cannot resort to self-help to

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[2] *Schiavonne & Sons*, 136 NLRB 993; *Abraham Kaplan*, 116 NLRB 1533; *Markwell & Hartz*, 120 NLRB 578; *News Syndicate Co., Inc.*, 141 NLRB 578; *Philadelphia Inquirer*, 142 NLRB No. 1, 52 LRRM 1504; *J. A. Jones Construction Co.*, 135 NLRB 1402; *New York Times Co.*, 137 NLRB 665; *New York Times Co.*, 137 NLRB 1435; *S & W Construction Co.*, 142 NLRB No. 19, 52 LRRM 1542; *Brown & Williamson*, 139 NLRB 1140.

attain its objective. Such conduct as that engaged in by Respondent, picketing and inducement of strikes and work stoppages to force the assignment of particular work tasks to members of a particular craft or labor organization rather than to employees in another craft or in another labor organization to whom the work has been assigned, has repeatedly been held to be conduct in support of jurisdictional disputes proscribed by Section 8(b)(4)(D). *LeBaron v. Los Angeles Building Council,* 84 F. Supp. 629 (S.D. Calif.) aff'd (C.A. 9), 185 F. 2d 405; *Schauffler v. Local 1091, Longshoremen* (C.A. 3), 292 F. 2d 182, aff'd 185 F. Supp. 203 (E.D. Pa.); *Doude v. Longshoremen* (C.A. 2), 242 F. 2d 808; *Schauffler v. United Association* (C.A. 3), 218 F. 2d 476; *Schauffler v. United Association* (C.A. 3), 230 F. 2d 572; *Doude v. Wood, Wire & Metal Lathers* (C.A. 3), 245 F. 2d 223; *Doude v. Longshoremen* (C.A. 2), 242 F. 2d 808; *Vincent v. Steamfitters* (C.A. 2), 288 F. 2d 276; *Cuneo v. Local 825, Operating Engineers* (C.A. 3), 306 F. 2d 394; *Local 450, Operating Engineers v. Elliott* (C.A. 5), 256 F. 2d 630; *Cuneo v. Local 825, Operating Engineers* (C.A. 3), 300 F. 2d 832; *McLeod v. Newspaper Deliverers' Union,* 205 F. Supp. 477 (S.D. N.Y.); *McLeod v. Truckdrivers Local 283,* 210 F. Supp. 769 (S.D. N.Y.) and see: *International Longshoremen v. Juneau Spruce Corporation* (C.A. 9), 298 F. 2d 177, aff'd 342 U.S. 237.

In connection with the theory advanced by the Respondent that it was merely seeking compliance by REECO with the terms of an arbitration award (the AGC award), the Trial Examiner stated:

> Additionally, with respect to the A.G.C. determination, the evidence reveals that IBEW did not participate in or become a party to the proceeding which led to the A.G.C. determination, and may not be said to have joined in a voluntary method of adjusting the facet of the IBEW-Teamster dispute with which the A.G.C. determination dealt. In the circumstances, the A.G.C. determination would not bind the IBEW nor serve to deprive the Board of jurisdiction in the Section 10(k) hearing.[3]

Moreover, the Board has consistently held that jurisdictional demands, in the guise of contract interpretation or enforcement, are not insulated from the reach of Section 8(b)(4)(D) merely because the work dispute stems from differing interpretations of contractual jurisdictional clauses. *Local 110, Sheet Metal Workers International Association, et al. (Brown and Williamson Tobacco Corp.),* 143 NLRB 947, 951. See also *Willamette National Lumber Co., et al.,* 107 NLRB 1141, 1143, footnote 2, and cases cited therein.

Respondent also contends that in making its 10(k) determination the National Labor Relations Board invaded the province of the U. S. District Court for the District of Nevada, which in Case No. 666 (Respondent's suit for specific performance of the AGC award) in its Order Staying Proceedings held that it "has concurrent jurisdiction with the National Labor Relations Board." The short answer to any such conten-

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[3]*Newspaper and Mail Deliverers' Union of New York and Vicinity, Independent (News Syndicate Co., Inc.),* 141 NLRB 578, 580.

tion is Section 10(a) of the Act which vests the Board with the power to prevent unfair labor practices and further provides that "this power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." The Board has on occasion considered the decisions of other tribunals in reaching its decisions but it is well established that these decisions are not binding upon the Board. See *Spielberg Manufacturing Co.,* 112 NLRB 1080, and cases cited therein; *Carey v. Westinghouse,* 375 U.S. 261, 271-272.

Moreover, it is clear that the U.S. District Court for the State of Nevada disagrees with Respondent. It granted the National Labor Relations Board's request for its 10(l) injunction. Furthermore, the District Court has stayed Respondent's suit to enforce its contract, pending the resolution of this matter. The Stay Order is still in effect. In its *Order Staying Proceedings* the District Court clearly indicated that it believed that the National Labor Relations Board did have jurisdiction and should make a final, binding determination.

> . . . and the Court being fully advised in the law and the premises, the Court finds:
>
> 1. That the United States District Court for the District of Nevada *has concurrent jurisdiction* with the National Labor Relations Board over the matters alleged in plaintiff's Complaint and Supplemental Complaint.
>
> 2. That proceedings in this action should be stayed until after the National Labor Relations

> Board Trial Examiner's Hearing in Case No. 20-CD-134, scheduled to commence April 6, 1965, or until after any continued setting of said Trial Examiner's Hearing, and until after final decision thereafter by the National Labor Relations Board and appropriate review by a Court or Courts of Appeal having jurisdiction in the premises.
>
> It Is Therefore Ordered that all proceedings in the above entitled action be, and the same *are hereby, STAYED* until after the National Labor Relations Board Trial Examiner's Hearing in Case No. 20-CD-134, scheduled to commence April 6, 1965, or until after any continued setting of said Trial Examiner's Hearing, *and until after final decision thereafter by the National Labor Relations Board and appropriate review by a Court or Courts of Appeal* having jurisdiction in the premises, after which any party to the above entitled action may petition the Court for further proceedings herein. (Emphasis added.)

And, of course, the Board has already determined that as to the "contract" theory advanced by Respondent its interpretation of the Carter-Leigon Agreement is adverse to the Teamsters and that as to area practice:

> (w)e do find, however, that with respect to such factors as employer, industry, or area practice, and efficiency or economy of operation, the record on balance tends to support the Employer's assignment of the work to the electricians rather than to the teamsters. (R. Vol. I, p. 78.)

As the National Labor Relations Board's Trial Examiner stated:

> In context of the Respondent's contentions, the Board's observations in *Local 110, Sheet Metal Workers International Association, AFL-CIO, etc.,* 143 NLRB 947, 951, is pertinent. The Board there said:
>
> > The Board has consistently held that jurisdictional demands, in the guise of contract interpretation, are not insulated from the reach of Section 8(b)(4)(D) merely because the work dispute stems from the Employer's and Union's differing interpretations of a jurisdictional clause.
>
> In light of all the foregoing, and as the Respondent's first procedural defense reduces to a restatement of principles of law the applicability of which the Board in the Section 10(k) proceeding either explicitly or implicitly rejected; or to Board precedent which is distinguishable and without precedential efficacy in this unfair labor practice proceedings, I reject it. (R. Vol. I, p. 32.)

Respondent also will apparently assert to this Court that because the conduct alleged in Paragraph VI(b) of the National Labor Relations Board's Complaint occurred after the amended charge was filed by REECO, the Board had no right to hear this dispute. The fact that proscribed conduct occurring after the date of the amended charge was alleged as violative of the Act in the Complaint does not in any way affect the validity of the Board proceeding. *Texas Industries,* 134 NLRB 365-366-367; *Triboro Carting Corporation,* 117 NLRB 775, 777-778, enfd. (C.A. 2), 251 F. 2d 959. A National Labor Relations Board Complaint may allege all unfair labor prac-

tices which are related to or grow out of the charge. *National Licorice Co. v. NLRB* (1940), 309 U.S. 350; *NLRB v. Kohler Co.* (C.A. 7, 1955), 220 F. 2d 3; *NLRB v. Kingston Cake Co.* (C.A. 3, 1951), 191 F. 2d 563; *NLRB v. Westex Boot & Shoe Co.* (C.A. 5, 1951), 190 F. 2d 12; *Doude v. Longshoremen* (D.C. N.Y.) (1956), 147 F. Supp. 103; *Atlas Boot Mfg. Co.* (1956), 116 NLRB 565; *NLRB v. Fant Milling Co.,* 360 U.S. 301. Since the charge serves only as a request that the National Labor Relations Board take action, inclusion in the complaint of allegations not included in the charge but revealed by investigation is warranted even though additional conduct violative of the Act occurred *after* the filing of the charge. *NLRB v. Anchor Rome Mills, Inc.* (C.A. 5, 1956), 225 F. 2d 775; *NLRB v. Harris* (C.A. 5, 1953), 200 F. 2d 656; *H. N. Thayer Co.* (1952), 99 NLRB 1122; *Morristown Knitting Mills* (1948), 80 NLRB 731.

That the circumstances of this case place it squarely within the ambit of the United States Supreme Court's Decision in *NLRB v. Fant Milling Co.,* 360 U.S. 301, is apparent from the analysis set forth by the Trial Examiner:

> It seems apparent that investigatory machinery of the Board was set in motion by the charge herein which alleged proscribed conduct to enforce Respondent's claim to the disputed hauling and unloading work. The conclusion patently to be drawn from the Section 10(k) notice issued by the Regional Director, is that the investigation conducted under his auspices had revealed the existence of a dispute encom-

> passing not only the hauling work but the composite staffing issue, as well. The amended charge patently, by its terms, related in part the issue of transporting materials from the compound point of unloading to point of use. It was upon these charges and the investigation undertaken by him that the Regional Director noticed the Section 10(k) matter for hearing, and that the allegations of the complaint in the Section 8(b)(4)(D) proceeding were based. (R. Vol. I, p. 33.)

In *Fant Milling, supra,* the Supreme Court plainly stated:

> The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstruction to interstate commerce, as this Court has recognized from the beginning. *NLRB v. Jones & L. Steel Corp.,* 301 U.S. 1, 81 L. Ed. 893, 57 S.Ct. 615, 108 ALR 1352.
>
> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge. For these reasons we adhere to the views expressed in *National Licorice Co. v. NLRB.*
>
> *NLRB v. Fant Milling Co.,* 360 U.S. 301, 308-309.

The Court in *Fant Milling, supra,* further explained the rationale of its decision by quoting di-

rectly from its decision in *NLRB v. National Licorice Co.,* 309 U.S. 350, 369, as follows:

> Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the court below correctly held that 'the Board was within its power in treating the whole sequence as one.' *Fant Milling, supra,* p. 307.

It is abundantly clear from the Record in this case that Respondent's activities come within the purview of Section 8(b)(4)(D) of the Act notwithstanding the fact that Respondent may also have sought other lawful objects thereby. *NLRB v. Operating Engineers, Local 12* (C.A. 9), 293 F. 2d 319; *NLRB v. Denver Building Council,* 341 U.S. 675; *Electrical Workers v. NLRB,* 341 U.S. 694, 700; *NLRB v. Lithographers* (C.A. 9), 309 F. 2d 31; *Department*

Store Employees v. Brown (C.A. 9), 284 F. 2d 619, 623.

CONCLUSION

It is respectfully submitted that the decision and order of the National Labor Relations Board concluding that jurisdiction over the transportation of electrical supplies utilized by the electricians in the performance of their work belongs to electricians rather than the teamsters represented by Respondent and that Respondent's picketing and other activities directed toward the reassignment of that work from the electricians to employees represented by the Respondent violate Section 8(b)(4)(D) of the Act is supported by substantial evidence and is not arbitrary or capricious. *NLRB v. International Longshoremen's and Warehousemen's Union* (C.A. 9, 1967), 373 F. 2d 33. Therefore, the petition of the National Labor Relations Board for enforcement of its Order should be granted.

Dated, San Francisco, California,
September 21, 1967.

Respectfully submitted,
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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Philip Paul Bowe,
Attorney for Intervenors.